59

(3)

09-1066

No.

Supreme Court, U.S.
FILED
APR 16 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

vs.

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

GARY S. MAYERSON
Counsel of Record
TRACEY SPENCER WALSH
MAYERSON & ASSOCIATES, PC
330 West 38th Street, Suite 600
New York, New York 10018
(212) 267-7200
gary@mayerslaw.com

Attorneys for Petitioners
K.Y. and T.Y., individually and on behalf of their minor child, T.Y.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. REVIEW OF THE SECOND CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A DIRECT CONFLICT IN THE CIRCUITS AND THIS CASE IS ONE OF IMPORTANCE TO ALL CHILDREN WITH DISABILITIES	3
II. REVIEW OF THE "FOUR CORNER" RULE WAS PROPERLY PRESERVED AND REQUIRES REVIEW	6
III. REVIEW OF THE SECOND CIRCUIT'S FAILURE TO EMPLOY THE ORDINARY MEANING OF "LOCATION" IS NECESSARY	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: **Page(s)**

A.K. v. Alexandria City School Board,
484 F.3d 672 (4th Cir. 2007) 3, 4, 5

Forest Grove School District v. T.A.,
129 S. Ct. 2484 (2009) 2, 5

T.Y. v. N.Y. City Dep't of Educ.,
584 F.3d 412 (2d Cir. 2009)..... 3, 4, 5

Winkelman v. Parma City School District,
127 S. Ct. 1994 (2007) 1, 2, 3

Statutes:

20 U.S.C. § 1414(d)(1)(A)(vii)..... 6

20 U.S.C. § 1414(e)..... 7

34 C.F.R. § 300.501(c)(1)..... 7

INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") provides educational rights and safeguards to children with disabilities. In 2007, Congress amended the IDEA and developed the Individuals with Disabilities Improvement Act ("IDEIA"). Both the IDEA and IDEIA strengthened the educational rights of children with disabilities, and the right of parents to be equal members of the Individualized Education Program ("IEP") team.

This Court, in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), expressly recognized that parents of children with disabilities have independent rights under IDEIA, including the statutory right to be members of any group that makes decisions on the educational placement of their child. T.Y.'s parents were denied this fundamental right when the school placement decision was unilaterally decided by the New York City Department of Education ("NYC DOE") **after** the IEP meeting, but without **any** prior consultation with the student's parents. Respondent studiously avoids any discussion of *Winkelman*.

New York City has over 300 different placement options in its "District 75" program. T.Y.'s IEP did not identify or recommend a specific school placement. That issue was never even broached for discussion at T.Y.'s IEP meeting, or even thereafter, because of the NYC DOE's established policy—a policy that **excludes** parents from the school placement decision. New York City has charted its own course, and has decided that it may simply send

parents a piece of paper, without any prior discussion, unilaterally selecting the student's school.

Excluding parents from the opportunity to meaningfully participate in the decision making process regarding the specific location and features of the student's school placement abrogates parental rights under IDEIA and *Winkelman*. It also gives rise to a most unhelpful split between the circuits. This Court should grant the writ to make sure that New York City and other municipalities do not get the idea that they may grant themselves special exemptions from the requirements of the Act.

The Second Circuit erroneously blamed T.Y.'s parents for not waiting longer for the NYC DOE to recommend an appropriate placement for T.Y. By the end of June, 2006, the NYC DOE failed to offer an appropriate placement for T.Y. T.Y.'s IEP was to start on July 1, 2006, leaving T.Y.'s parents with no choice but to timely mount a due process challenge.

As this Court recognized in *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009), children with serious disabilities simply cannot wait indefinitely, and parents should be able (under the IDEIA) to unilaterally place their disabled child in a private placement without trying out an inappropriate placement or waiting beyond the commencement of the school year.

Respondent misrepresents the underlying facts of this case, ostensibly to draw attention away from the salient issues. By way of example only, at page 5

of Respondent's brief, Respondent misrepresents that "additional speech and language therapy, and ABA services" were recommended as part of T.Y.'s IEP. That is not the case. In fact, even the impartial hearing officer explicitly found that the NYC DOE **failed** to offer T.Y. adequate speech and language services and ordered additional speech and language services as part of her decision. A recommendation that T.Y. receive ABA services was never made a recommendation on T.Y.'s May 10, 2006 IEP.

The Second Circuit's decision directly contravenes the rights of parents under IDEA, *Winkelman* and is in direct conflict with *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007).

I. REVIEW OF THE SECOND CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A DIRECT CONFLICT IN THE CIRCUITS AND THIS CASE IS ONE OF IMPORTANCE TO ALL CHILDREN WITH DISABILITIES

Respondent implicitly acknowledges that there is a conflict in the circuits, but suggests that it is not important enough for resolution. The school placement decision, however, is not merely some minor, purely ministerial decision. It is a core issue that requires discussion and meaningful involvement of the student's parents **before** the decision is made.

The Second Circuit's decision in *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009) effectually held that there is no free appropriate public education ("FAPE") deprivation when the

placement location is not on the IEP and is decided without the meaningful participation of parents. The Second Circuit's decision in *T.Y.* is in direct conflict with *A.K.* In both cases, the respective school districts failed to identify a location for the program services at the IEP meeting and on the IEP itself, that could fully implement the terms of the IEP. In both cases, the parents were unsure that an appropriate school would be identified that would adequately meet their child's individual and unique needs.

In *A.K.*, the Fourth Circuit held that the school district failed to offer a FAPE when its individualized education program—the IEP—did not identify a particular school placement. In *T.Y.*, in stark contrast, the Second Circuit held that,

> "[e]ducational placement" refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the "bricks and mortar" of the specific school. Further, the requirement that an IEP specify the "location" does not mean that the IEP must specify a specific school site." *See* 584 F.3d 412 at 10.

While Respondent selectively quotes language in an effort to distinguish *A.K.* as not being in

conflict with *T.Y.*, Respondent fails to address a significant portion of the Fourth Circuit's decision in *A.K.*:

> "But, certainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE." *See* 484 F.3d 672 at 683.

In *T.Y.*, the Second Circuit in effect holds that failure to identify a school will **never** amount to a deprivation of FAPE. There is thus now an unhelpful split in the circuits that warrants granting the writ.

The Second Circuit's decision also contradicts *Forest Grove*'s holding that parents do not have to try out an inappropriate educational placement for their child. The Second Circuit presumed that T.Y.'s parents sought a "veto" power but this is simply not true. Indeed, it is ironic that the Second Circuit was offended by what it perceived to be premature action by T.Y.'s parents, yet was unmoved by the NYC DOE's conduct in **excluding** T.Y.'s parents from the entire school placement decision.

II. REVIEW OF THE "FOUR CORNER" RULE WAS PROPERLY PRESERVED AND REQUIRES REVIEW

Petitioner properly preserved its right to ask this Court to review whether or not courts can look beyond the "four corners" of the written IEP in analyzing whether the content of the IEP provides the student with a FAPE. Petitioner repeatedly raised the issue of procedural violation at every level. Specifically, Petitioner challenged T.Y.'s IEP as procedurally (as well as substantively) deficient and claimed, *inter alia*, that no school *situs* appeared on T.Y.'s IEP and therefore, to determine FAPE, the court would have to look beyond the IEP to determine appropriateness. Petitioner has continuously argued that this is a procedural violation amounting to a deprivation of FAPE. At every level, petitioner has argued that IDEA requires that the anticipated frequency, **location** and duration of services and modifications be listed in the IEP pursuant to 20 U.S.C. § 1414(d)(1)(A)(vii).

Accordingly, this issue was properly preserved for this Court's review and respondent's argument that it was not properly preserved is erroneous.

III. REVIEW OF THE SECOND CIRCUIT'S FAILURE TO EMPLOY THE ORDINARY MEANING OF "LOCATION" IS NECESSARY

The case law is clear that when a term is not defined in a statute, it must be given its "ordinary meaning." The Second Circuit failed to give the term "location" its ordinary meaning and contorted the term location to mean something other than what it means in the context of 20 U.S.C. § 1414(e) and 34 C.F.R. § 300.501(c)(1). Just as respondent ignores *Winkelman*, respondent ignores these statutory references in its brief.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Dated: April 15, 2010

Respectfully submitted,

GARY S. MAYERSON
Counsel of Record
TRACEY SPENCER WALSH
MAYERSON & ASSOCIATES, PC
330 West 38th Street, Suite 600
New York, New York 10018

Attorneys for Petitioners
K.Y. and T.Y., individually and
on behalf of their minor child, T.Y.

APPEALTECH
7 West 36th Street, 10th Floor
New York, New York 10018
(212) 213-3222
{16292}